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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No.....

LURA D. GLASSEY and HENRY L. BROENING,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Because of new matter presented by respondent's answer to petition, petitioners respectfully request the court's permission to file this, their reply thereto.

In answering the contentions of respondent, petitioners will reply in the order of presentation adopted by respondent—making references to the pages of respondent's answer.[1]

Statement of the Case.

Respondent states [Ans. 2] "the subsection does not prohibit persons who are cultists of nudism from commingling" and then says that it is not unlawful to operate a camp "*provided* the sexes are segregated"! (Italics added.) What respondents are attempting to say is not

[1]References to Respondent's Answer will be as follows: [Ans.] followed by the page number in brackets. Thus: [Ans. 1].

clear. Certainly a camp where the sexes are segregated is no place where nudism may be practiced. Such a concept negates the very precept of nudism that the human body is not a thing of shame or of mystery but rather that true modesty is found when both the male and female forms are presented in their entirety.[2]

What is meant by the wording of subsection (h) (Petition, Appendix A, p. 2) that "it shall be unlawful for any person to operate, manage, or conduct any camp, colony, or other place of resort, wherein three or more persons not all of the same sex are permitted or allowed to commingle in the nude; or wherein persons are permitted or allowed to view persons of the opposite sex in the nude" if not that a place where nudism may be practiced is prohibited and that petitioners are made criminals because of their beliefs in and the practice of nudism?

Respondent would have this court believe [Ans. 2] that none of those who attended the camp were nudists or believed in the tenets of nudism. A mere glance at the record demonstrates the contrary. The whole record is replete with examples of the persons practicing nudism and with their professions of their belief in its tenets [R. 33, 34, 35, 36]. The very registration form (Petition, Appendix B) that all persons who entered the camp had to sign [R. 33] shows that those who attended were or desired to be members of the Fraternity Elysia and that

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[2] *Sunshine and Health*, September 1947, page 24.

they believed in the tenets of nudism. True, the *arresting officers* lied when they signed the form [R. 33]. But there is nothing to even hint that the others at the camp were equally false in their declarations.

Respondent's own evidence shows that at the time of the arrest one of the persons at the camp said [R. 34]:

> "Do you know anything about nudism? It has given us great health benefits, it has helped my wife considerably . . . there were so many other children who were having trouble because of sex curiosity, but . . . the children who were brought up in the belief in nudism did not have any of that trouble . . . their morals were of the highest caliber."

Respondent's witness reported petitioner Glassey as having told him about Fraternity Elysia [R. 35] (see Appendix B to Petition for an exposition of its precepts); further that she told him that the Fraternity ran the camp [R. 35]; and that she told him about the benefits of nudism and that all members of the Fraternity believed in it [R. 35].

Certainly sincerity of belief and practice cannot be gainsaid in this case.

ANSWER TO RESPONDENT'S ARGUMENT.

I.

The Federal Question Is Squarely Before This Court.

A.

Petitioners Are Nudists and Believe in the Tenets of Nudism.

Respondent asserts to this court that the record fails to show that either of the petitioners was a believer in nudism or a subscriber to the beliefs set out in the registration form (Petition, Appendix B) [Ans. 5]. As indicated above, even a summary glance at the record demolishes this fantastic claim. Petitioner Glassey testified [R. 36]: "I am a member of Fraternity Elysia." The registration form (Petition, Appendix B) says:

> "We, holding these beliefs and findings (concerning nudism as set forth preceding this statement in the form) in common, band ourselves together as the Fraternity Elysia, for the interchange of social and cultural values and the permanent establishment of some retreat, wherein we may be free from the prying eyes and prejudices of the public at large and may enjoy the health giving sun and air freely and without restriction."

As to petitioner Broening, the record shows that the Fraternity Elysia ran the camp and that each member had as much say about it as anyone else [R. 35]. Thus Broening's statement that "he was *one* of the managers" (italics added) [R. 36] shows that he, as a member of the Fraternity Elysia, had a say as to the running of the camp. And it shows that as a member of the Fraternity he believed in its precepts.

Further, from the very nature of the belief in nudism, even aside from what the record affirmatively shows, it is unreasonable to compare the running of a nudist camp with the conducting of a resort for consumptives. In the nature of things people don't conduct nudist camps unless they are nudists and believe in its principles. Such an occurrence just doesn't happen.

B.

The Constitutional Question Was Properly and Timely Raised.

The record shows that petitioners from the very beginning of the proceedings asserted the unconstitutionality of the ordinance. In the trial court they objected to any evidence being introduced on the ground that the ordinance was unconstitutional being indefinite, vague and uncertain [R. 32, 33] and that the complaint stated no facts to constitute a public offense [R. 33]. If the ordinance on which a complaint is founded is unconstitutional, no public offense is stated.[3]

Later, and in time according to California law,[4] petitioners moved the trial court in arrest of judgment on the ground that no public offense was stated [R. 24].

Again, in the argument before the Appellate Department petitioners urged that the section was unconstitutional because it is ambiguous and uncertain and because it is an unlawful restraint on individual personal liberty [R. 50, 60].

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[3] *De Jonge v. Oregon*, 299 U. S. 353;

[4] California Penal Code, Sections 1450, 1452, 1461a.

The above, with nothing more, shows sufficiently and succinctly how and that the precise constitutional issues urged here were presented to both state courts. For, as this court has indicated:[5]

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

But this record shows more. It shows that the lower court considered and passed upon all the above arguments [R. 60] and in addition that it considered and passed upon the argument of *amicus curiae* that the ordinance violated the First and Fourteenth Amendments to the United States Constitution [R. 60]. The mere fact that *amicus curiae* happened to *mention* by number the Federal Constitutional provisions does not detract from the fact that petitioners relied on these same provisions and urged their rights under them. What were petitioners' arguments that the ordinance is vague and uncertain [R. 32, 33] and ambiguous [R. 60] and that it violated their individual personal liberty [R. 60] if not claims under the First and Fourteenth Amendments to the United States Constitution? The very decision of the lower court [R. 51] shows that it considered and passed on these claims. And the point

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[5]*New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67.

is bolstered by that court's certificate, as to what was before it, considered and passed upon [R. 60].

And even further, petitioners in petitioning for a rehearing specifically named the Federal Constitutional provisions by number [R. 55, 56, 57].

Such is the state of the record. It clearly comes within this court's rulings in *Whitney v. California*,[6] *Honeyman v. Hanan*[7] and *New York ex rel. Bryant v. Zimmerman*.[8]

Before leaving the subject, it should be pointed out that in California an unconstitutional ordinance is no law at all;[9] that the question of the failure of the complaint to charge a public offense may be raised at any time during the progress of the case;[10] and that unconstitutionality may be raised even after affirmance on appeal by way of habeas corpus.[11] Thus here, even accepting respondent's assertion as to when petitioners themselves raised the question, it is clear that they did so and named the Federal Constitutional provisions by number in their petition for rehearing before the lower court [R. 55, 56]. And it is equally clear that that court considered and passed on their arguments [R. 60].

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[6]274 U. S. 357, 361, 362.

[7]300 U. S. 14.

[8]*Supra*, Note 5.

[9]*Pacific Indemnity Co. v. Myers*, 211 Cal. 635, 292 Pac. 1084; *Robison v. Payne*, 20 Cal. App. (2d) 103, 66 P. (2d) 710.

[10]*People v. Smith*, 103 Cal. 563, 37 Pac. 516; *People v. McKean*, 76 Cal. App. 114, 243 Pac. 898; *People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681.

[11]*In re Bell*, 19 Cal. (2d) 488, 122 P. (2d) 22.

In any event, the courts in California will consider and pass on the constitutionality of an ordinance though raised and argued by *amicus curiae*.[12]

This case is a far cry from *Rescue Army v. Municipal Court*,[13] relied upon by respondent [Ans. 5]. In that case the ordinance involved was a highly technical one whose interpretation was confusedly interrelated with many other sections and wherein the decision of the state court was intimately connected with the decision in *Gospel Army v. City of Los Angeles*,[14] which appeal this court dismissed because of lack of finality of the state court judgment. In giving its reasons for declining to decide the constitutionality of the ordinance in the *Rescue Army* case this court said (pp. 1236, 1237):

> "In the first place, the constitutional issues come to us in highly abstract form. Although raised technically in the separate proceeding in prohibition, they arise substantially as upon demurrer to the charges against Murdock in the criminal proceeding. The record presents only bare allegations that he was charged criminally with violating pp. 44.09 (a), 44.09 (b) and 44.12, and that those sections are unconstitutional, on various assignments, as applied to his alleged solicitations. We are therefore without benefit of the precision which would be afforded by proof of conduct made upon trial. Moreover, we do not have the benefit on this record of even the literal text of the charges. Indeed, the summarized statement of the pleadings leaves us in doubt whether there were only two, or, on the other hand, three dis-

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[12] *Pacific Indemnity Co. v. Myers, supra,* Note 9.

[13] 91 L. Ed. (Adv.) 1221.

[14] 91 L. Ed. (Adv.) 1241.

tinct offenses charged. . . . In these circumstances we are unwilling to undertake clarifying the ambiguity."

No such problem is present in the case at bar. The constitutional issues do not come to this court "in highly abstract form." They come to this court with the "precision afforded by proof of conduct made upon trial." And whereas in the *Rescue Army* case this court did not even have "the literal text of the charges," no such defirmity is present here. The precise charge is a part of the record [R. 1, 2] wherein is set forth the complaint itself. There is no question here as there was in the *Rescue Army* case as to how many offenses were charged. It is clear from a reading of the complaint [R. 1, 2] that there is but one and one only. There is no ambiguity for this court to resolve nor any matter of ambiguity as to state procedure or state law.

There is before this court a record, crystal clear, presenting the constitutional issue, raised by the petitioners from the very beginning of the proceedings.

While respondent's statement that one may not challenge the constitutionality of an ordinance unless he is adversely affected thereby [Ans. 6] is true as a general proposition, the statement adds nothing to respondent's argument because the petitioners easily come within the rule. It is precisely they whose liberties are being imfringed upon by the ordinance. It is precisely they who are being prevented from the practice of their belief in nudism. Respondent's argument that petitioners merely ran a camp where nudism was practiced and that they were arrested because of that fact and not because they practiced nudism is a clever bit of legal sophistry. It is asking this court

to be blind to the true import of the ordinance as applied to these petitioners. It is to be remembered that "the constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name."[15] If respondent is correct, a method has been discovered wherein bigoted public officials can with impunity prevent the exercise of constitutional liberties. All that need be done is to prohibit the operation of a place where these liberties may be practiced and then to criminally prosecute one for conducting such a place. For example, under this theory the legislature may make it illegal to conduct a place wherein Catholicism is taught. Then, by arresting the person who conducted such establishment, respondent would have this court say that there is no infringement on the exercise of religion because the arrest was made not for worshipping but simply for conducting a place where the worshipping may be done. Such toying with and evasion of fundamental constitutional rights will not be permitted by this court.[16]

Aside from this and at the risk of appearing redundant, petitioners again point out that they themselves are nudists and were attempting to practice their belief and were arrested therefor [R. 33, 35, 36].

And finally we should be mindful that the ordinance is a curtailment on the exercise of individual freedom of expression. In judging its constitutionality on its face, therefore, this court will view it in the light of the abuses that may, from the language of the ordinance, arise from it.[17]

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[15]*Cummings v. Missouri,* 4 Wall. (U. S.) 277, 332.

[16]*Smith v. Allwright,* 321 U. S. 649; *Lane v. Wilson,* 307 U. S. 268.

[17]*Thornhill v. Alabama,* 310 U. S. 88, 97.

II.

The Section Involved Does Interfere With the Practice of Nudism.

Respondent's assertion that the "practice of the tenets of nudism is not prohibited (by the ordinance in question) to the devotees of such cult, *except to the extent that the ordinance requires that those who practice such tenets in camps must forego the exposure of themselves in the nude to persons of the opposite sex*" (italics added) [Ans. 7] contains within itself its own refutation.

The section quite clearly prevents the operation of any place where nudism may be practiced (Petition, Appendix A). This is an *absolute prohibition* and is far more restrictive than the statutes held invalid on their face in *Thomas v. Collins,*[18] where a permit was given as a matter of course, or in *Hague v. C. I. O.,*[19] where the administrative office had discretion to issue the permit. By this section the entire right is outlawed.

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[18]323 U. S. 516.

[19]307 U. S. 496.

III.

The Acts Prohibited by the Ordinance in Question Are Within the Protection of the First and Fourteenth Amendments to the Federal Constitution and Come Within the "Clear and Present Danger" Rule.

These matters have already been presented to this court by petitioners [Pet. 8-15] and so will not be repeated here.

Respondent apparently urges, however [Ans. 11], that because the argument advanced by petitioners is a novel one, this court should decline to consider it. Quite the contrary; this court does not decline to hear a matter because of the novelty of the question. In fact, that is one of the very reasons as to why this court will grant certiorari (Rule 38(5)(a) of this court). The beauty of the Constitution is its ability to keep abreast of and to cope with new situations as they arise.

Such is the case at bar.

The writ should therefore issue.

Respectfully submitted,

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